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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 1009 65

J. C. CROCKETT,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

No. 1010 66

J. C. CROCKETT,

Petitioner,

vs.

GEORGE H. McELROY AND PETER A. HANNA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

OLIVER M. LOOMIS,
South Bend, Indiana;
CARLISLE DURFEE,
Chicago, Ill.;
JOSEPH M. SANDERS,
Bluefield, W. Va.;
Counsel for Petitioner.

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GEORGE H. McELROY AND PETER A. HANNA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

J. C. Crockett, trading and doing business as Central Motor Sales Company at Princeton, Mercer County, West

Virginia, respectfully represents that he is aggrieved by certain judgments of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above consolidated cases on December 21, 1940, affirming judgments of the United States District Court for the Southern District of West Virginia, in favor of the United States of America, George H. McElroy and Peter A. Hanna, against petitioner in the sums of $575.00, $2795.33, and $3116.50, respectively, and therefore, petitioner prays that writs of certiorari should issue from this Honorable Court to review said judgments of said Circuit Court of Appeals for the Fourth Circuit.

Opinions Below.

The United States District Court for the Southern District of West Virginia did not file a written opinion in rendering judgment in these cases.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in Federal Reporter Advance Sheet, February 17, 1941, page 646, and will be found on page 186 of the printed record. Judge Dobie's dissenting opinion will be found on page 196 of the printed record. A petition for a re-hearing was denied on February 6, 1941.

Jurisdiction.

The judgments of the United States Circuit Court of Appeals for the Fourth Circuit were entered on December 21, 1940. A petition for re-hearing was duly filed and was refused by an order entered on February 6, 1941.

The jurisdiction of this Court is invoked under the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925; U. S. C. A. Title 28, Section 347(a).

Questions Presented.

The sole question presented in these cases is whether the evidence is sufficient to support the jury's verdict and the judgments entered thereon. Petitioner contends that the jury's verdicts are contrary to the law and the evidence and are not supported by the evidence, and for that reason, the lower court should have set the verdicts aside, and that the Circuit Court of Appeals erred in affirming said judgments. More specifically, the questions presented for determination are as follows:

Question No. 1.

Is an automobile dealer liable for the negligent acts of the driver of the dealer's automobile occurring under the following circumstances?

An automobile dealer employs a salesman on a commission basis; no salary. The hours of service are not fixed. The salesman works if, as and when he pleases. The salesman has authority to use the employer's car on employer's business but not for the salesman's own personal pleasure and convenience. The cars are kept on the employer's used-car lot, and when the salesmen wishes to secure a car for the purpose of demonstration or sale, he obtains permission from the employer and secures the keys from the office. On the day of the accident, the salesman obtained from the employer permission to take a car for the purpose of interviewing and demonstrating the car to a prospect. The salesman did not attempt to see the prospect, but falls in with two male friends, neither of whom are prospects for the sale of the car in question. The car was not at any time demonstrated or attempted to be sold to either of said friends. The salesman and the male friends became intoxicated and went for a joy ride lasting from 9 a. m. until 4 p. m. About 9 a. m., and again about 11 a. m., the

salesman attempts to interest one friend in the purchase of a new DeSoto car, but the friend displays no interest. The subject was not thereafter discussed. About 4 p. m., the automobile containing the salesman, two male friends and one female friend and headed toward a beer joint for the purpose of having a party, and while being driven by one of the male friends without the knowledge or consent of the employee, who was unconscious from drink, and lying in the rear seat of the car, negligently collided with another car, and caused personal injuries and property damage. The evidence does not disclose that the employee had ever taken a drink of liquor prior to the day of the accident or that the employer knew or had any reason to believe that the employee was addicted to the use of intoxicating liquors, or was an incompetent driver. The injured party sues the employer on the theory that the driver of the car was the agent and representative of the employer and acting on the employer's business, and that employer is responsible for the negligent acts of the driver.

Question No. 2.

Under the facts stated in Question No. 1, was the Circuit Court of Appeals justified in holding that because the salesman became intoxicated on the day of the accident that the jury could infer (a) that the employee was in the habit of becoming intoxicated; (b) that the employer either knew or should have known of such habit; (c) that, therefore, the employer was negligent in turning his car over to said employee.

Question No. 3.

Under the facts stated in Question No. 1, was the court justified in rendering judgment against the employer on the ground that the employee was a drunkard; that the employer either knew or should have known this fact, and

was therefore negligent in turning his car over to said employee, especially in view of the fact that the injured party sought recovery against the employer on the sole ground of agency, and the question of agency was the only issue submitted to the jury or tried in the lower court. The question of the negligence of an employer in turning his car over to an employee known to be addicted to the use of intoxicating liquor, an entirely different cause of action from the one declared on, if in fact it constitutes a cause of action, was not raised in the lower court, either in the pleadings or evidence, or instructions submitted to the jury, and there was not a scintilla of evidence to support such a finding except the bare fact that on the day of the accident the employee became intoxicated.

Statement.

On November 17th, 1939, in the District Court of the United States for the Southern District of West Virginia, George H. McElroy instituted a civil action against Central Motor Sales Company, a Corporation, J. C. Crockett, Robert Holt, Frank Ellison and Peter A. Hanna, to recover damages for personal injuries sustained by him on February 20, 1939, about 4 o'clock p. m., about one mile east of the corporate limits of the City of Princeton, West Virginia, when an automobile alleged to have been operated by Frank Ellison and Robert Holt as the agents and representatives of Central Motor Sales Company, a Corporation, and J. C. Crockett, and approaching a car operated by McElroy, and another automobile owned and operated by Peter A. Hanna, which was closely following McElroy, collided with the automobile then and there being operated by McElroy and said collision resulted in injury to McElroy and the demolition of the car operated by him. McElroy was an employee of the Federal Bureau of Investigation, and the

car operated by him was owned by the United States of America, and on the same date the United States of America instituted a civil action against the same defendants named in the first action to recover for damages to said automobile.

Thereupon, J. C. Crockett filed an answer in both cases, admitting that on the day of the accident he was trading and doing business as Central Motor Sales Company, but denied that said business was incorporated, and further alleged that he was the owner of the Plymouth sedan which collided with the car being driven by McElroy, and that said Plymouth car at the time of said accident was being operated by Frank Ellison, but denied that said Frank Ellison or Robert Holt (correct name Herbert Holt) another occupant of said Plymouth car, were his agents or representatives, or engaged in any business for him at the time of said accident, and further disclaimed any and all liability for said accident.

Thereupon, Peter A. Hanna filed a written answer denying any negligence on his part, and alleged that the sole cause of the accident was the joint negligence of McElroy and J. C. Crockett, Robert Holt and Frank Ellison, which answer further alleged that Hanna suffered personal injuries and property damage in said collision, and set up a counter-claim for said damages against McElroy, Crockett, Holt and Ellison.

Thereupon, on the day of trial, Herbert Holt, improperly sued as Robert Holt, filed an answer setting forth that his correct name was Herbert Holt; that at the time of said accident he was riding in the Plymouth sedan owned by Crockett, but that he was not driving said car, and that at the time of said accident, he was not acting as the agent or representative of J. C. Crockett, and was not engaged in any business for J. C. Crockett.

Thereupon, it was agreed by and between counsel for McElroy, Hanna, The United States of America, Crockett and Holt that said cases might be consolidated and heard together, and this was done by a proper order.

Frank Ellison was present in court as a witness, but was not represented by counsel.

Thereupon, McElroy and The United States of America introduced their evidence and rested, at which time, Hanna, Crockett and Holt moved for directed verdicts, but said motions were overruled. Thereupon Crockett and Holt introduced their evidence and rested, and Hanna introduced his evidence and rested, and at the conclusion of his evidence, Hanna adopted the same testimony given on behalf of The United States and McElroy "as to the agency in this case" (R. 144). Thereupon, Crockett, Holt and Hanna again moved for directed verdicts which motions were again overruled. Thereupon the case was argued by counsel, and the jury received the court's charge and proceeded to consider of its verdict, and later returned the following verdicts:

(1) A verdict in favor of Hanna on McElroy's claim against Hanna;

(2) A verdict in favor of McElroy on Hanna's counter-claim against McElroy;

(3) A verdict in favor of Hanna on Hanna's counter-claim against Crockett, Holt and Ellison, for the sum of $3116.50;

(4) A verdict in favor of McElroy against Crockett, Holt and Ellison for $2795.33; and

(5) A verdict in favor of The United States of America against Crockett, Holt and Ellison for $575.00.

There is no question as to the form of the verdicts.

Thereupon, Crockett and Holt moved the court to set aside said verdicts and award them and each of them a new

trial, and to enter judgment in their favor, notwithstanding the jury's verdicts, which motions were overruled and the court entered judgment on the jury's verdicts.

Petitioner J. C. Crockett alone appealed from the above mentioned judgments in favor of Hanna, McElroy and The United States of America to the United States Circuit Court of Appeals for the Fourth Circuit, which court, on December 21, 1940, affirmed the judgments of the District Court. Petitioner applied for a re-hearing which was refused on February 6th, 1941.

Statement of Facts.

The accident involved herein occurred on February 20th, 1939, about 4 p. m., about one mile east of the corporate limits of Princeton, West Virginia. McElroy, a Federal Bureau of Investigation agent, operating a car owned by United States of America, was driving in a westerly direction toward Princeton, West Virginia, and Peter A. Hanna was also driving toward Princeton, and closely following the car driven by McElroy. So far as the evidence discloses both McElroy and Hanna were driving at a reasonable rate of speed and in a proper manner. As McElroy ascended a slight hill and reached the crest thereof, he observed a truck approaching from the opposite direction and almost instantly a car which was following close behind the truck, and traveling at a very fast rate of speed, attempted to pass the truck, and in doing so, drove to the left of the center of the road and collided with the car being driven by McElroy, which was on the proper side of the road. Almost simultaneously with the first collision the car operated by Hanna and which was closely following the McElroy car crashed into the rear of the McElroy car. Both McElroy and Hanna were injured and the cars operated by them were considerably damaged, and petitioner does not question either the amounts of the several

verdicts, or the fact that Ellison's negligence was the proximate cause of the accident. Petitioner's sole contention is that he is not responsible for the acts of Frank Ellison and Herbert Holt, who are alleged to have been operating petitioner's Plymouth sedan at the time of the accident.

The Plymouth car approaching from the west and which crashed into McElroy was owned by petitioner, who at that time was engaged in the business of selling new and used cars at Princeton, West Virginia, under the name of Central Motor Sales, and was driven by one Frank Ellison. Ellison was not an employee of petitioner, and so far as the evidence discloses was not known to petitioner. Other occupants of the Plymouth sedan at the time of the accident were Robert Weikel, who was riding on the front seat next to Ellison, the driver, Vergie Keatley, who was sitting on the front seat next to the right door, and Herbert Holt, sued herein as Robert Holt, who was lying in the rear seat unconscious from drink. All of the above named occupants of the Plymouth sedan were highly intoxicated and, as stated, Herbert Holt was lying on the rear seat and had "passed out".

Due to the fact that there is only one question involved in this case, namely, the responsibility of petitioner for the acts of Ellison and Holt at the time of the accident, we will not burden this petition with the details of the accident. The evidence clearly justified the jury in finding that Ellison's negligence was the proximate cause of the accident. We shall, therefore, set forth the facts showing the relationship existing between petitioner and the occupants of petitioner's car; the manner in which the car had been obtained and the object and purpose of the journey on which the car was engaged at the time of the accident. The following facts appear from the evidence, which is singularly free from conflict.

Petitioner was engaged in the business of selling new and used cars at Princeton, West Virginia, under the name of Central Motor Sales, which he individually owned. Herbert Holt had been in petitioner's service for approximately one year as a car salesman. Holt did not have regular working days or hours; he worked if, as and when he pleased. He was not paid a salary, but worked purely on a commission basis (R. 98). He had the right to use petitioner's automobiles for business purposes only, but did not have the right to use them for his own personal pleasure and convenience. When he had a prospect, he would talk the matter over with petitioner and get petitioner's permission to take the car out; that when he wanted to demonstrate the car to a prospective purchaser, he would get petitioner's permission; that the cars were kept in the garage and on the used-car lot, and the keys were kept in the office. After he, Holt, had demonstrated the car, he would place it in the used-car lot or in the garage; that he never used petitioner's cars in going to and from his home at night (R. 98-99); that he had authority when demonstrating cars to prospective purchasers to allow them to drive the cars (R. 100); but did not have the authority to permit other persons to drive the cars (R. 117); that he always talked it over with petitioner before taking a car out to demonstrate to a prospective purchaser (R. 100). The foregoing facts with reference to Holt's authority were testified to by Holt as a witness for McElroy and The United States of America, and this evidence was later expressly adopted by Hanna (R. 144). There is no evidence in the record to the contrary.

Prior to the day of the accident, Holt had a prospect for the sale of a car at Hiawatha, West Virginia, a man by the name of Hale. About nine o'clock a. m., on the morning of the accident, Holt inquired of petitioner whether he should take the car and go to see Hale at Hiawatha, and peti-

tioner said that he thought this would be a good idea. Holt then secured the keys to the car and left petitioner's garage driving the car (R. 118). There is no evidence showing or tending to show that Holt had been drinking when he left the garage with petitioner's car; to the contrary, the evidence clearly shows that the drinking began later.

When Holt left petitioner's place of business, it was his intention to go to Hiawatha and see Hale. That was Holt's understanding with petitioner. However, Holt did not go to Hiawatha to see Hale; instead, he drove the car down the main street of Princeton, and near the Virginian Railway station met Frank Ellison, whom he had known for several years, but whom he had not seen for about a year (R. 81). Holt stopped and Ellison got in the car and Holt asked Ellison about one of Holt's prospects for a car in Monroe County. Prior to that time Ellison had never helped Holt sell a car and had never given him the name of a prospective purchaser (R. 123).

After interrogating Ellison about Holt's prospect in Monroe County, Holt and Ellison had a general conversation (R. 118). They had been talking about fifteen or twenty minutes when Robert Weikel came up and joined in the conversation. Ellison and Weikel were old friends and had been out together the night before, but Holt had not met Weikel. During this conversation, according to Ellison, Holt tried to interest Weikel in a new DeSoto car, but Weikel did not appear to be interested in a new car at that time, or a used car in any event (R. 74, 75 and 80). Weikel then produced a pint bottle with some liquor in it and Ellison, Holt and Weikel went down to the coal yard to drink the liquor. They stayed at the coal yard approximately 20 or 30 minutes, and after consuming the pint of liquor, they proceeded to the liquor store, and Ellison went in and purchased another pint with money furnished by Weikel. After leaving the liquor store, Holt, at the request of Elli-

son and Weikel, took them back down town to let them out (R. 119); but after they got back down town, Weikel and Ellison requested Holt to take them out on the Athens road to take a drink of liquor (R. 119). Holt agreed to this and drove the car out on the Athens road where he, Ellison and Weikel consumed the second pint. Ellison says that while they were out on the Athens road, Holt again talked to Weikel about selling Weikel a car (R. 80). Holt and Weikel are not entirely clear as to where the conversation took place between them with reference to this new DeSoto car, but it is entirely clear from the evidence that the subject was discussed down near the railway station about 9 o'clock a. m., or out on the Athens road about 10:30 or 11 o'clock a. m., or possibly at both places. However, the evidence is quite clear that this subject was not mentioned after leaving the Athens road about 11 o'clock a. m. (R. 74-75, 80 and 89). On page 89 of the printed record, Weikel states that the car was out on the Athens road about 2 or 2:30 p. m. However, on further questioning, it clearly appears that Weikel was mistaken as to the time, and that in truth and in fact, the car was out on the Athens road about 10:30 or 11 a. m. We quote from Weikel's testimony appearing on pages 88 and 89 of the printed record:

> "Q. 1. As I understand it, then, the only time you talked with Herbert Holt or he talked with you about trading cars was out on the Athens road. A. That's the only time I call to memory.
>
> Q. 2. And about what time of day was that? A. I don't just remember. It must have been around two o'clock, I suppose, or two-thirty, something near that. I don't just remember.
>
> Q. 3. What time did the accident happen? A. Well, I don't remember that exactly. Don't remember what time it happened.
>
> Q. 4. You were out on the Athens road early in the morning, weren't you? A. Yes, out on the Athens road, in the morning this was.

Q. 5. What time was it when he mentioned to you about trading cars? A. I don't remember. I don't think I saw him until about ten o'clock.

Q. 6. About how long was it after you saw him? A. I imagine something like thirty minutes; something like that.

Q. 7. You saw him down at the station at Princeton? A. Yes, sir, close to the station.

Q. 8. I believe you had a little liquor? A. Yes, sir.

Q. 9. And you and Frank and Herbert Holt went down to the coal yard and drank some liquor? A. Yes, sir.

Q. 10. Then you decided to go out on the Athens road? A. Yes, sir."

From the foregoing, it clearly appears that the car was out on the Athens road about 10:30 or 11 o'clock a. m. And it is also clear that if Holt made any effort to sell Weikel a new car, it was out on the Athens road.

After consuming the second pint of liquor on the Athens road, Holt, Weikel and Ellison went back to the liquor store to secure a third pint of liquor. This was the last Holt remembers until he regained consciousness after the accident (R. 120). Holt did not remember asking Weikel or Ellison to drive the car, and did not know until after the accident that either of them had driven it. Holt did not attempt to sell this particular car to Weikel, Ellison or any other person and was not demonstrating it, and had not demonstrated it to any person that day. Weikel was not in the market for a used car; in fact, he had a Ford V-8 1937 model which was in better condition than the Plymouth car in which they were riding (R. 76) and Weikel was not interested in any car at that particular time (R. 74, 75, 76 and 80).

After purchasing the third pint of liquor, the evidence is by no means clear where Holt, Ellison and Weikel went. Ellison testified that about noon, they stopped at the West End filling station at Princeton to get a chaser, stayed ten

or fifteen minutes (R. 77); and that at this point Herbert Holt asked him, Ellison, to drive, but that he, Ellison, replied that he did not have an operator's license and that he, Ellison, said "Let Bob drive, and Bob started driving", and Ellison further testified that after this Holt did not again ask him, Ellison, to drive (R. 78). Weikel's version of this is somewhat different from Ellison's. Weikel remembered being at the West End filling station and testified that Ellison said to him, "Bob, drive it and see how you like it", and that at this time Holt was lying down in the rear seat, and he does not remember whether Holt heard the conversation (R. 87, 88). However, it is an admitted fact that Weikel drove the car from the West End filling station to the DeLuxe Sandwich Shop, a beer joint located on the Princeton-Beckley highway, reaching there, according to the proprietor, between 12 and 1 o'clock (R. 110); and when they reached the DeLuxe Sandwich Shop, Weikel and Ellison, who were very drunk at that time, got out of the car and went into the sandwich shop. Holt did not get out of the car, he was lying in the rear seat "passed out".

Weikel and Ellison stayed at the sandwich shop fifteen or twenty minutes and left in company with a woman by the name of Vergie Keatly, who the evidence discloses was also very drunk (R. 114, 116, 106 and 84). Vergie Keatly told Ann Blevins that they, (meaning Weikel, Ellison and herself) were going out to a cabin (R. 108). When the car left the DeLuxe Sandwich Shop, Ellison was driving, Weikel was next to Ellison on the front seat and Vergie Keatly was in the front seat next to the right door. Holt was still lying in the rear seat "passed out".

Holt was not consulted with reference to the proposed party, and did not request Ellison or anyone else to drive the car; in fact, he had no knowledge of what transpired for several hours prior to the accident.

None of the occupants of the car remembered where they went after leaving the DeLuxe Sandwich Shop about 1 p. m., until the time of the accident, which occurred about 4 p. m. In fact, Weikel did not remember where they picked up Vergie Keatly (R. 112-114).

Two witnesses, Pansy Burnett (R. 112-114) and Vergie Hunter (R. 114-117), saw Weikel, Ellison and Vergie Keatly about 3:30 or 4 p. m., in East Princeton, and at that time Weikel, Ellison and Vergie Keatly were all very drunk, and Holt was still lying in the rear seat apparently unconscious, and at that time, Weikel, Ellison and Vergie Keatly said they were going to Gooch Harris' place and throw a party, and wanted the witnesses Pansy Burnett and Vergie Hunter to go along. However, these girls refused to go because the occupants of the car were all drunk. Gooch Harris' place is a beer joint located on the Princeton-Oakvale road about 5 miles from Princeton, where cabins are rented. According to Pansy Burnett, when she and Vergie Hunter refused to go along, they, meaning Ellison and Weikel and Vergie Keatly, starting blowing the horn in front of her house, and when she went out, they "took off like a cyclone"; (R. 114).

There is little, if any, conflict in the evidence in this case, and we desire at this point to summarize some of the material facts about which there is not the slightest conflict. On the morning of the accident, Holt left petitioner's place of business in petitioner's car for the express purpose of going to Hiawatha to attempt to sell the car to a Mr. Hale, a prospective purchaser, and petitioner agreed to the use of the car by Holt for this purpose. Holt left the garage about nine a. m., and there is no evidence showing or tending to show that he was drinking. He fell in with Ellison and Weikel, and the three proceeded to get very drunk. Neither Ellison nor Weikel was a prospective purchaser for this particular car, and the car was not used that day for the

purpose of demonstrating it or attempting to sell it to either Weikel, Ellison or Vergie Keatly, or to any other person. Ellison's operator's license had been revoked and he was not a prospect for any car, new or used. Weikel seemed to be a prospect for a new car at a later date, but was not a prospect for a used car. Holt mentioned selling Weikel a new car on one or possibly two occasions, and found that Weikel was not interested in buying a new car at that time. This was discussed once at the Virginian Railway station about 9 a. m., and again out on the Athens road about 10:30 a. m., according to Weikel (R. 89), and between 10 and 11 a. m., according to Ellison (R. 80). The sole purpose of the trip out on the Athens road was to drink liquor (R. 77 and 119), and the sole and only purpose of the entire trip, commencing at nine a. m., and ending in the collision about 4 o'clock p. m., was, according to Holt, Weikel and Ellison, to joy ride and drink liquor (80, 81, 92 and 121). The evidence is conclusive that the accident occurred about 4 p. m.; (see evidence of McElroy, R. 24; Hanna, R. 136; Dr. Hale, R. 50; Dr. Todd, R. 54; Pansy Burnett, R. 112, and Vergie Hunter, R. 115).

All of the occupants of petitioner's car were drunk at the time of the collision and Holt was unconscious. Holt did not know who was driving the car, or where it was going. Ellison began driving the car at the DeLuxe Sandwich Shop while Holt was unconscious and without the knowledge or consent of Holt. This was approximately 3 hours prior to the accident. No one requested Ellison to drive. At the time of the collision, petitioner's car was being driven in the opposite direction from Princeton, and towards Gooch Harris' beer joint on the Oakvale road, at which place Weikel, Ellison and Vergie Keatly intended to rent a cabin and have a party. Holt did not have the right to use this car for his own pleasure or convenience, or to drive to and from his home. He could only use it on business of peti-

tioner and after obtaining permission to do so, and after demonstrating the car to prospective purchasers, it was his duty to return it to the garage or the used-car lot. He was not a salaried employee, but worked purely on a commission basis. He worked if, as and when he pleased. The above facts with reference to Holt's authority were brought out by Holt, testifying as a witness for the United States of America, and McElroy, and this evidence was later expressly adopted by Hanna, and there is not the slightest evidence to the contrary.

Except for the fact that Holt became intoxicated on the day of the accident, there is not a scintilla of evidence in the entire record showing or tending to show that he was a man of inebrious habits or that prior to the day of the accident he had ever taken a drink of liquor, or that he was an incompetent driver or an irresponsible person, and it obviously follows that there is no evidence to the effect that petitioner knew or had a reason to believe that Holt was a person of inebrious habits or an incompetent driver or an irresponsible person.

Except for the fact that Holt on the day of the accident, about 9 a. m., and again about 11 a. m., which was approximately five hours prior to the accident, attempted to sell Weikel a new DeSoto car, there is no evidence showing or tending to show that Holt was acting on the business of petitioner at the time or on the day the accident occurred. To the contrary, the evidence shows without conflict that Holt was unconscious from drink from about 1 p. m., to 4 p. m., when the accident occurred, and that at the time of the accident, the car, driven by Ellison, without the knowledge or consent of Holt, was headed for Gooch Harris' beer joint for the purpose of renting a cabin and throwing a party.

As above stated, the United States of America, McElroy and Hanna have proceeded throughout upon the theory that

at the time of the accident, Ellison and Holt were acting as the agents of petitioner, and that therefore petitioner is liable for said negligent acts. In other words, that the principle of respondeat superior fixes petitioner's liability. This was the theory upon which the complaints were drawn, the theory upon which the case was tried in the District Court, and the theory upon which the jury were instructed and the case argued. Plaintiff did not proceed on the theory that Holt was a man of inebrious habits or an incompetent driver or an irresponsible person, and that petitioner had knowledge thereof, and as above stated, except for the admitted facts that Holt became intoxicated on the day of the accident, there is no evidence whatever to support such a theory. The Circuit Court of Appeals apparently based its judgment on the last mentioned theory.

Specification of Errors to be Urged.

The United States District Court for the Southern District of West Virginia, and the United States Circuit Court of Appeals for the Fourth Circuit erred in holding that the evidence was sufficient to justify the jury in finding that petitioner was responsible for the acts and conduct of Ellison and Holt at the time of the occurrence of the accident involved in this case.

Reasons for Granting the Writs.

There are two special and important reasons for granting writs of certiorari in these cases:

(1) These cases involve important questions of general law, and in rendering judgments against petitioner, the Circuit Court of Appeals for the Fourth Circuit has decided important questions of general law in a way untenable and in conflict with the decisions of the Supreme Court of Appeals of West Virginia, the United States Circuit Court of

Appeals for the Fourth Circuit, other Circuit Courts of Appeals, and the Supreme Court of the United States, and against the clear weight of authority.

That the cases are important and the decision erroneous is indicated by Judge Dobie's dissenting opinion (R. 196), from which we quote:

> "I regret that I cannot concur in the majority opinion in these cases. *As these cases seem to me highly important,* and, further, since the field of liability for injuries received in automobile accidents (particularly when the relation of agency is involved) *is one of increasing public concern,* I am setting forth, probably at greater length that is customary in dissenting opinions, reasons for the legal faith that is in me."

(2) In affirming the judgments against petitioner, the Circuit Court of Appeals for the Fourth Circuit has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

In deciding these cases, the Circuit Court of Appeals drew from the evidence material and controlling conclusions not warranted by any view of the evidence, and using as a basis said erroneous conclusions, the court decided the case upon an issue not raised or mentioned in the pleadings, not submitted to the jury in the court's charge, not considered by the court, and on which issue no evidence whatever was offered by any of the parties to these actions. The cause of action declared on was based on respondeat superior—agency. The case was tried and submitted to the jury on this theory. However, the Circuit Court of Appeals affirmed the judgments on the ground that Holt was a man of inebrious habits, that petitioner knew this fact, or should have known it, and was therefore negligent in entrusting his car to Holt, an entirely different cause of action from the one

pleaded and tried in the lower court, if, in fact, it states a cause of action, and one without the slightest evidence to support it.

Petitioner is entitled to be fully and fairly informed of the charges against him so that he can prepare his evidence to meet such charges. He is entitled to have the case decided upon the issue or issues raised in the pleadings, and tried in the court below. Any ruling which deprived him of such rights and deprived him of an opportunity to be heard is unreasonable and unjust, and so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Honorable Court's power of supervision.

We, therefore, respectfully submit that the ruling of the Circuit Court of Appeals for the Fourth Circuit calls for the exercise of the supervisory power of this court, and that writs of certiorari should issue from this Honorable Court directed to the United States Circuit Court of Appeals for the Fourth Circuit, to the end that the judgments complained of herein may be reviewed and reversed.

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